Supreme Court, U.S
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No. 08-562

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In the
Supreme Court of the United States

WILLIAM MALIHA,

Petitioner,

– v. –

FRANK FALUOTICO and SARA G. MALIHA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE SUBJECTIVE INTENT OF A POLICE OFFICER MAY BE ADMISSIBLE IN DEMONSTRATING THAT HE HAS FABRICATED AN OBJECTIVE BASIS FOR AN ARREST?

2. WHETHER IN LIGHT OF SUBSTANTIAL EVIDENCE OF SUCH PERSONAL ANIMOSITY AND THE DUBIOUS VERACITY OF THE REPORTING VICTIM, WHICH COULD NOT BE DETERMINED ON SUCH A MOTION, THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT?

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OPINIONS BELOW

The district court's opinion granting respondents' motions for summary judgment was filed on February 28, 2007 and is reported at 2007 U.S. Dis. LEXIS 13602. The Court of Appeals' decision affirming the district court's decision was rendered on June 20, 2008 and is reported at 2008 U.S. App. LEXIS 13097. The Court of Appeals' order denying rehearing or rehearing **en banc** was issued on August 20, 2008 and the mandate issued on August 29, 2008.

JURISDICTION

This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. sec. 1254(1) as the order of the Court of Appeals for the Second Circuit was entered as a mandate on August 29, 2008 and is final.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution shields citizens from false arrest.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

After discovery was completed, respondents moved successfully for summary judgment. The district court held that Faluotico had probable cause to trigger petitioner's arrest and held that "it was entirely proper for Faluotico to rely on trustworthy statements from a witness to determine whether probable cause existed." Judge Kahn further wrote, "In this instance, there was **every reason to credit the allegations as the apparent victim, respondent Maliha, recounted these facts soon after she fled the scene in fear, going to her neighbor's house.**" [SA-8]. (Emphasis added).

Judge Kahn rejected Faluotico's argument that "Judge Work's decision finding that petitioner committed harassment in the second degree requires the Court to find that probable cause existed and dismiss Petitioner's claim for false arrest." [SA-8-9].[1] The court held that "it would stretch the test [of preclusion] to conclude that Judge Work's conclusion was actually and necessarily decided and reviewed by the appellate court such that it should bind the Court." [SA-9].[2]

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[1] In fact, the Family Court found that Sara Maliha had punched her husband in the face and never concluded that Dr. Maliha had assaulted her.

[2] Respondents filed no notice of cross-appeal with regard to this or any other issue. The Appellate Division for the Third Department found that no family offense had been adjudicated below and did not review this issue.

The district court also rejected petitioner's substantive due process claim, since, his Honor found that it "directly arises from Respondents' actions that allegedly deprived him of liberty" and "is more properly characterized as a false arrest claim and not a substantive due process violation." Finding that "the Fourth Amendment provides the constitutional foundation for such claims," Judge Kahn dismissed it, citing *Albright v. Oliver*, 510 U.S. 266 (1994). [SA-10]. Judge Kahn declined to address any of the other arguments Faluotico made below.

Having dismissed petitioner's claim against Faluotico, the district court held that "there is no constitutional violation under which Petitioner can sustain an action against grievant Maliha under sec. 1983." [SA-11]. The district court held that Faluotico's subjective intent was irrelevant, that the police agency had the right to arrest petitioner based upon Sara Maliha's willingness to sign a supporting deposition regardless of its inconsistency with her initial statement to the reporting deputy sheriff and Faluotico's lack of any investigation into what had occurred. Indeed, the district court denied that Faluotico had **any** obligation to investigate the truthfulness of Sara Maliha's revised account of events and could exercise his own subjective hostility toward petitioner, however blatant, so long as Sara Maliha was prepared to swear out a supporting deposition.

On appeal, the Second Circuit affirmed, holding that no material disputed facts existed and that Faluotico's intense and expressed hostility toward Dr. Maliha could not be used to call into question the **bona fides** of his conduct. Indeed, according to the

Second Circuit, the only relevant issue on the false arrest claim was whether Faluotico had an "objective basis" to direct petitioner's arrest and Sara Maliha's supporting deposition provided this.

STATEMENT OF FACTS

The Second Circuit has affirmed the improvident use of summary judgment, denying Dr. William Maliha a jury trial on his claim that a police detective, Frank Faluotico, ordered his arrest and caused his prosecution without probable cause and maliciously.

Taking the facts most favorably to petitioner, for purposes of the Rule 56 motion:

On June 19, 2002, Sara Maliha, then petitioner's wife, grabbed a chain from around his neck during a domestic dispute. She punched him in the face and he attempted to calm her by backing her across the kitchen, controlling the hands she had used to strike him.

After leaving the family residence, Sara Maliha went to the home of a close friend, Ina Liffman. Mrs. Liffman called 911. Upon arrival, a sworn deputy sheriff, John Sperath, interviewed Mrs. Maliha, observed and recorded that she had no physical injuries, did not need or want medical attention and wanted no further police involvement. Sperath then departed the Liffman residence with the intent to find petitioner and better understand what had occurred.

Mrs. Liffman then called respondent, Frank Faluotico, a detective with the Sheriff's Office.[3] She and Mrs. Maliha advised Faluotico of the domestic incident on the phone. There is no evidence that, during this phone call, Mrs. Maliha sought the arrest or incarceration of her husband. Faluotico then began a series of actions which form the basis for this suit.

Based upon his subjective hostility toward the petitioner, not the underlying facts of this case, and substantially embroidering his meager current tense knowledge of petitioner, Faluotico began an avid campaign of misrepresentation aimed at getting his superiors to order petitioner's arrest.

After deputy sheriff Sperath reported to the desk sergeant, Greg VanKleek, that petitioner and his wife had had an argument, Sgt. VanKleek reported to his captain, "There was nothing physical that I know of. Nobody was hurt or anything."[4] Sperath also

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[3] At the time of these events, Faluotico was the former long-time paramour of a presiding appellate division Judge, Karen Peters, who herself remained close friends with the Liffmans and Sara Maliha. Faluotico had himself been enmeshed socially with Sara Maliha and the petitioner several years before the events in question.

[4] Petitioner filed a FOIL request for tape recordings of conversations between and amongst members of the Ulster County Sheriff's Department relating to his arrest. According to Faluotico, who heard the tape recordings after petitioner produced them during discovery, they were created by the Ulster County Sheriff's Department and maintained in its ordinary course of business. Faluotico assumed these conversations would be taped. These have been transcribed and certified by a court reporter and were provided to the district court. The distinct conversations reported in the transcript are

reported that he had no basis to arrest petitioner as Dr. Maliha had committed no assault and caused no injury. Moreover, he reported, Sara Maliha did not wish to press charges. After making this report to his sergeant, Sperath proceeded to petitioner's home to discuss what had occurred with him. When Sperath arrived, petitioner was not at his residence.

Faluotico's Involvement Caused Petitioner's Arrest

From the Liffmans' home, Sara Maliha spoke with Faluotico, who was at his home the evening of June 19, 2002, for five to ten minutes. Deputy Sheriff Sperath had already come and gone and Faluotico knew this. **By his own admission, Faluotico did not get involved in the investigation of the incident on the evening of June 19 and never spoke with petitioner about what had occurred.**

After Sara Maliha had denied that she had been assaulted when questioned by Sperath, Faluotico intervened with his superiors, advocating for petitioner's arrest, arraignment, the entry of an order of protection against him and the seizure of weapons which petitioner had previously inherited and/or purchased and retained at the marital residence.

The transcript of conversations shows the following:

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numbered. The above excerpt is from the second conversation, between Sgt. VanKleek and his Captain.

Deputy Sheriff John Sperath responded to the scene of the Liffman home and spoke with Sara Maliha. He reported to Sgt. VanKleek that he had spoken with Sara and when asked, "Has somebody been assaulted or not?," he responded "No, there's no charge." VanKleek directed Sperath to speak with Dr. Maliha to get his side of the story.

Faluotico then called into the Sheriff's Department and asked to talk with VanKleek who he wanted to "oversee this whole thing". VanKleek reported to Faluotico that Captain VanVliet had directed him to have deputy sheriff Eric Benjamin get petitioner's badge and ID.[5] This did not satisfy Faluotico, who replied, "*But that's not the problem ... Let me tell you. This guy has been losing it, as of late.*" (Emphasis added). Faluotico continued, "He's got an arsenal the size of ..."

VanKleek interrupted and told Faluotico that he had already told Mrs. Maliha that "it's nothing physical or no criminal charges at this point." Faluotico responded, "Oh, yes there are." VanKleek then asked, "Oh, there are?" Faluotico then protested, "That's where Sperath is fucking dropping the ball." *Id.* Faluotico then stated, "That's why I'm calling you."

Faluotico then commenced his exaggerations and false statements: he told VanKleek, "He grabbed her and was *slamming her against the wall in front of the child.*" (Emphasis added). Faluotico stated, "That is the criminal charge." VanKleek then challenged

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[5] Faluotico knew this had occurred because he is the person who called "the boss," who, in turn, called Capt. VanVliet and informed him of the incident in the first place.

him, "that's what she's saying or we have proof of that, marks and everything else, or is that just her word?" Faluotico then vouched for his co-respondent. "That's what she's saying and she's very believable." Faluotico then told the sergeant to have someone go up because Sara Maliha was now willing to sign a complaint. Faluotico told the sergeant to get a *criminal complaint* to support an order of protection.

Faluotico went further, telling the sergeant, "In my heart, I feel he's dangerous right now." He then cautioned VanKleek not to send Sperath to petitioner's house alone, "because ... when he [Dr. Maliha] knows he's outnumbered, he turns into a bug. And ... I don't want to see a fucking open fire situation here."[6]

Faluotico then told the sergeant that he had known Sara Maliha "for years" and "this isn't the first time. This is only the first time that it's gotten this bad that she had to call the police."[7]

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[6] At deposition, Faluotico claimed that he told the captain that Maliha was like "a bug when cornered" because petitioner "became very irrational to deal with when you cornered him in a situation, yeah, from when we had been at social gatherings." Predictably, Faluotico could not remember any specific situation when he had seen Maliha so behave.

[7] At his deposition, Faluotico testified to the contrary: that he had NO information that night that there had ever been any prior incidents of domestic violence perpetrated by Dr. Maliha, that he was "shocked" to hear it had happened and that no one he and the Malihas mutually knew had ever made any comment to him which suggested any such abusiveness. Indeed, as of that date, he knew nothing about the state of the Maliha marriage.

Faluotico then admitted that Sara had "no physical injuries" and that petitioner could not be charged with an assault, only "harassment second." Faluotico then again exaggerated, claiming that petitioner had "thrown" Sara Maliha "to the wall".

In the same conversation with VanKleek, Faluotico explained to the sergeant why his captain had called a few moments before and directed VanKleek to send Benjamin to get Maliha's badge and ID: "Yeah, because I talked to the boss already." Faluotico boasted, "That's why the Captain got called."[8] According to Faluotico, he called both the Sheriff and the Captain [VanVliet]. In his conversation with the Captain, he reported that he and Dr. Maliha "weren't friends" and "I just didn't think it was a stable situation with all the guns in the house ... because I had seen unfortunate circumstances where domestic situations have led to death, and I didn't want to see that here."

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[8] At his deposition, when asked who he spoke with from the sheriff's department on June 19, 2002, Faluotico mentioned Captain VanVliet, Sergeant VanKleek, but did not testify that he spoke with the "boss". Later, during the deposition, Faluotico stated that he had called Sheriff Bockelman directly about this incident because "he's in the chain of command" and he had a responsibility to notify all the members of his chain of command if a department member is involved in an incident. When pressed as to whether there was any requirement that *he* call the Sheriff about the incident, Faluotico claimed that he was to make a report to his chain of command. When asked whether his superior directed that he call the Sheriff, Faluotico evaded the question and finally claimed that he told himself to call the sheriff. Indeed, the first person in his chain of command he called was the Sheriff.

In the fourth recorded conversation provided to petitioner, VanKleek, Faluotico and deputy sheriff Eric Benjamin engaged in a three-way conversation.[9] Faluotico continued to exaggerate what had occurred at the Maliha residence: asserting that petitioner "kind of lost it," he then embellished, "[H]e was slamming her up against the wall, throwing her around, grabbing her ... they've been not talking for weeks now." Faluotico then warned Benjamin not to approach the Maliha residence by himself, "he's in that paranoid state. And he — as you well know, man, that boy's got a lot — lot of toys."

After hearing Faluotico's fabrications, Benjamin queried, "if she got slammed, that's mandatory arrest, right?" Faluotico responded in the affirmative. Later, Faluotico explained his actual conversation of earlier that evening with Sara Maliha: "She called me and says, What I am supposed to do? And I said, "well, what happened?" And she goes, "Well, he *grabbed me*." I said, "Did you tell our deputy that?" And, she goes, "Yeah." And I said, "And he didn't sign a Complaint." She goes, "Well, no, he's supposed to call back because he wants to talk to him first." I'm like, "if he can't find him, he's got to come back and take a complaint from you; *you're going to have to have him arrested.*" (Emphasis added). And she goes, "Okay." And I explained the process, and I said, "You know, you're *going to have to get something with the kid, too. I said, because he can just take that kid and go because*

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[9] Benjamin was a senior and experienced deputy sheriff.

she's as much his as she is yours and until you guys work this all out, you got to play by the rules." [Emphasis added].[10]

When Sgt. VanKleek re-entered the conversation, Faluotico began describing where petitioner allegedly kept his weapons, baselessly representing that Dr. Maliha recklessly scattered his weapons around his home.[11] Benjamin then challenged the basis for a mandatory arrest, reminding VanKleek that Deputy Sheriff Sperath had spoken with Sara Maliha and determined that petitioner's arrest was unwarranted.

VanKleek then indicated that, according to Faluotico, an arrest was mandatory. Benjamin continued to object, arguing that Maliha did not pose a threat to anyone: responding to Faluotico's attacks on petitioner, Benjamin stated, "Does that make him a threat to other people? Yeah. He can be an asshole ..." After this call, by radio, Sgt. VanKleek spoke with Sperath, "Now I'm hearing that ... he was throwing her up against the wall and stuff". Sperath replied, "she said he pushed her into a cabinet, a kitchen cabinet." VanKleek then responded, "Well, but — you know, if *you see some marks on the arms or whatever. I mean, I know, you weren't there."* [Emphasis added]. Sperath replied, "No, no marks,

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[10] At his deposition, Faluotico testified inconsistently about this initial conversation, claiming that Sara Maliha told him that she had "been grabbed, pushed up against the counter, she had marks on her arms and that he had harassed her."

[11] In fact, Faluotico knew that petitioner kept his weapons in a climate controlled and locked storage room. Faluotico never received any report of petitioner brandishing his weapons before or on June 19, 2002.

no marks."[12] VanKleek replied, "I understand. But, if she's adamant about pressing a charge." Sperath retorted, "She wasn't. That's the thing. That's why I didn't."

Sperath then called back VanKleek and reported that he had just spoken with Faluotico: "He's involved."[13] "Anyway, apparently Frank wants harassment second." VanKleek assented to that statement and Sperath continued, "He wants the guy's guns seized, an Order of Protection, and he wants him arraigned." VanKleek replied, "I know all that[,]" and then asked Sperath, "When you first interviewed her, she was not adamant at all about pressing any charges correct?" Sperath replied, "Absolutely not. I asked her." VanKleek then reported that he had told Faluotico this. He then asked Sperath whether he had seen any visible evidence that she had been assaulted. Sperath replied, "None whatsoever. I checked both her arms."[14]

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[12] Again, Faluotico contradicted this in his deposition, claiming that he questioned Sara as to whether she had been injured and she told him both that she had marks on her arms and had told the deputy that. During his phone conversations with his colleagues on June 19, 2002, Faluotico never claimed that Sara Maliha told him she had any marks on her arms.

[13] Faluotico conceded that he called Sperath directly that evening.

[14] This contradicts Faluotico's account of what he claimed in deposition his co-respondent told him — "she had marks on her arms." And, in his discussions with other sheriff department officials on June 19, 2002, Faluotico never claimed that Sara Maliha told him she had any marks on her arms.

VanKleek agreed that there was no basis for a harassment second, but directed Sperath to have Sara Maliha sign an information anyway. Sperath noted, "Frank was pretty, pretty adamant about having him arraigned." VanKleek replied, "I understand. I understand how adamant Frank was. I understand."[15]

VanKleek then called the captain back and made clear that he was working on getting petitioner's badge and ID. He also told his superior that Sperath was working on getting a signed information from Sara Maliha. He then remarked, "But whether we use that or not, that harassment second, we'll have a signed information. So if he comes out and he is a little buggy, we'll do him for that. We'll do the arraignment. We'll get the order of protection."

At the instance of Faluotico, Sgt. VanKleek directed Sperath to return to the Liffman home and have Sara Maliha sign an information justifying petitioner's arrest. Sperath protested that Dr. Maliha had not committed an arrestable offense and recounted that he had originally spoken with Sara Maliha, who had denied that she had been assaulted or injured and declined to press any charge against petitioner. Another participant in these discussions,

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[15] When asked whether he asked Sperath during this conversation why the deputy sheriff had not arrested petitioner, Faluotico could not recall the specifics of the conversation at all. Faluotico denied that Sperath told him that Sara Maliha denied injury when he interviewed her in person. When asked whether Sperath told him that Sara Maliha did not want to press charges, Faluotico could not recall.

Deputy Eric Benjamin, knew Dr. Maliha well and protested the spurious nature of Faluotico's assertions about him.

However, based upon Faluotico's intervention, Sgt. VanKleek ordered that his subordinate, Sperath, prepare an information for Sara Maliha's signature. She then signed a false instrument which materially exaggerated petitioner's conduct and falsely omitted her own initiation of force against her husband.

Shortly after 10:00 p.m., on June 19, 2002, at the instigation of the respondents, acting jointly, members of the Ulster County Sheriff's Department falsely arrested and detained Dr. Maliha. That evening, petitioner remained in the custody of state agents for between two and two and one-half hours and was arraigned on the violation of harassment second.

On June 20, 2002, again using his position as a state actor, Faluotico contacted the Family Court, County of Ulster for the purpose of pressuring the Chief Court clerk, with whom he had a social relationship, to surreptitiously ensure that Judge Mary Work, with whom he was also socially acquainted through his prior romantic relationship with Judge Karen Peters, would enter an Order of Protection against the petitioner and a second order depriving Dr. Maliha of access to weapons he had purchased or inherited from his father.

In so intervening, Faluotico again baselessly exaggerated petitioner's dangerousness and made other highly disparaging comments about Dr. Maliha.

Dismissal of Criminal Charge against Petitioner

On September 17, 2002, the criminal charge against petitioner was dismissed in petitioner's favor and no court ever found him guilty beyond a reasonable doubt of any CRIMINAL charge based on the June 19, 2002 incident.

REASONS FOR GRANTING CERTIORARI

A. FALUOTICO'S SUBJECTIVE INTENT IS RELEVANT, NOT IRRELEVANT, TO THE FALSE ARREST CLAIM

This Court has repeatedly held that where police have an objectively reasonable to engage in a particular law enforcement function, their subjective intent is constitutionally irrelevant. *Brigham City, Utah v. Stewart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (holding that whether police officers were subjectively motivated by a desire to bring order to a tumultuous situation inside a home or a desire to save homes and property was irrelevant as either justified the police action); *Whren and Brown v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (since police had probable cause to make traffic stop, their subjective intent, i.e., whether they actually made the stop because they suspected drugs were in the vehicle, was constitutionally irrelevant).

However, in these cases and its other precedent, this Court has not passed on whether a hostile and personal motive by the arresting officer, one unrelated to proper law enforcement objectives, can defeat the constitutionality of an arrest which is itself objectively dubious. This is such a case.

Here, the issue of "subjective intent" is not raised in the context of choosing between two legitimate bases for law enforcement action as in the cited precedents. Rather, here, Faluotico has "created" or "manufactured" arguable probable cause for petitioner's arrest to carry forward a personal vendetta. His rhetoric obscured, indeed overwhelmed, the absence of objective probable cause or, put another way, intentionally created the semblance of objective probable cause, triggering Maliha's arrest. Examining Faluotico's bad faith is relevant to demonstrating how and why he concocted "probable cause" for this arrest. On such facts, the district court and Court of Appeals erred in dismissing as irrelevant Faluotico's personal animus. As Faluotico made the case for arrest by embellishments of his own making, not the incident as Sara Maliha initially reported it, any analysis which rejects entirely his subjective intent condones the personalization of the law enforcement function.

This Court did not address such issues in the cited precedent or in any other case which re-stated the "objective" basis for probable cause and rejected any focus on "subjective intent".

In adjudicating a claim for false arrest, the arresting officer's subjective intent may be deemed a relevant factor. If that officer, as here, manipulates a "non-victim" into signing a supporting deposition out of *his or her own* hostility toward the arrestee, this should be relevant in assessing a claim for false arrest. This is so precisely because the allegedly objective basis of the arrest is more likely fabricated with the assistance of an arresting officer acting with this hostile personal motivation.

To hold otherwise, as did both the district court and the Court of Appeals, condones highly improper police practice on a basis which that practice itself has materialized. This tautology permits the police too much latitude and insulates from suit a police officer, like Faluotico, who orchestrate false arrest by creating the allegedly objective predicate out of his own hostility. There is simply no precedent of this Court which brooks such condonation of blatant police misconduct.

B. SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED AND AFFIRMED CONTRARY TO THIS COURT'S PRECEDENTS

The Second Circuit has affirmed summary judgment where material issues of disputed facts compel the opposite result. This ruling effectively ignores the plain language of F.R.Civ.P. 56 and this Court's longstanding authority and teaching. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Simply stated, neither district courts nor the Courts of Appeal are to intrude into the role of the fact-finder. The instant decision is a blatant violation of that cherished principle which implements the right to a jury trial and sets a plain limit upon the appropriate fact-finding role of the district court deciding a Rule 56 motion.

Here, a reasonable jury could have decided that [a] Dr. Maliha did not harass, assault or batter his wife; [b] Mrs. Maliha truthfully recounted this to the first deputy sheriff who responded to the Liffman home; [c] with Liffman and Faluotico's

encouragement, Mrs. Maliha changed her story when she perceived an opportunity to gain advantage in her planned matrimonial; [d] Faluotico was aware of the change in account and the baselessness of lodging criminal charges against Dr. Maliha in that light; [e] despite this knowledge, out of his own hatred for Dr. Maliha and without having even seen Mrs. Maliha, Faluotico lobbied intensely for petitioner's arrest; [f] this action was informed not by a proper basis for an arrest, but, rather, by the venomous personal hostility Faluotico had toward Dr. Maliha.

Since the record construed most favorably to the non-moving party easily supports each of these propositions and since these propositions would satisfy the elements of false arrest, the Court of Appeals erred when it affirmed the grant of summary judgment to both Faluotico and Mrs. Maliha.

By continuing to decide contested issues of fact, the district courts and Courts of Appeal effectively deprive litigants, including petitioner, of their right to a jury trial before their peers. To correct this substantial and repeated error, the Supreme Court should grant petitioner's request for a writ of certiorari.

CONCLUSION

THE DECISION OF THE COURT OF APPEALS FAILS TO RECOGNIZE THAT FALUOTICO'S "SUBJECTIVE INTENT" INFLUENCED THE PRESENTATION OF THE ALLEGEDLY "OBJECTIVE EVIDENCE" WHICH PREDICATED PETITIONER'S ARREST. AS THE SEPARATION BETWEEN OBJECTIVE EVIDENCE AND SUBJECTIVE INTENT IS CLOUDED, THE FINDER OF FACT WAS ENTITLED TO CONSIDER FALUOTICO'S SUBJECTIVE INTENT IN DETERMINING WHETHER PETITIONER WAS SUBJECTED TO FALSE ARREST. FOR THIS REASON, THE GRANT OF SUMMARY JUDGMENT AND ITS AFFIRMANCE WERE WRONGFUL AND SHOULD BE REVERSED.

Dated: October 28, 2008

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

WILLIAM MALIHA,

Plaintiff,

-against-

1:04-CV-1127
(LEK/DRH)

FRANK FALUOTICO and
SARA G. MALIHA,

Defendants.

MEMORANDUM-DECISION AND ORDER

Plaintiff William Maliha ("Plaintiff") initiated this action against Defendants Frank Faluotico ("Defendant Faluotico") and Sara Maliha ("Defendant Maliha") following a domestic dispute involving Plaintiff and Defendant Maliha. Compl. (Dkt. No. 1). Pursuant to 42 U.S.C. § 1983, Plaintiff alleges that Defendants caused his false arrest and violated his Fourth Amendment right to be free of illegal search and seizure. *Id.* at ¶ 44. Plaintiff also alleges that "[b]y falsifying official government documents for and with the purpose of injuring plaintiff and denying him a fair trial, defendants violated plaintiff's right to due process as protected by the Fourteenth Amendment to the United States Constitution." *Id.* at ¶ 45. Plaintiff seeks compensatory and punitive damages and attorneys' fees. *Id.* at 9.

Presently before the Court are two Motions for summary judgment brought by Defendants pursuant to Rule 56 of the *Federal Rules of Civil Procedure*.

Dkt. Nos. 29, 30. For the reasons stated below, the Court grants Defendants' Motions for summary judgment and dismisses the case in its entirety.

I. Background

Plaintiff and Defendant Maliha were married in May, 1993. Compl. (Dkt. No. 1) at ¶ 4. On June 19, 2002, the couple had an argument at their residence. Deft. Faluotico Statement of Material Facts (Dkt. No. 29, Attach) at ¶ 10. Plaintiff alleges that the altercation occurred after he grabbed his camera from Defendant Maliha, who, in response, flung around and started punching him in the face. Plntf's Statement of Material Facts (Dkt. No. 36) at 9. It is undisputed that during the incident, Plaintiff held Defendant Maliha by her wrists and backed her up into a kitchen cabinet. Deft. Maliha's Statement of Material Facts (Dkt. No. 31, Attach. 3) at ¶¶ 4-5; Plntf's Statement of Material Facts (Dkt. No. 36) at 3. While Plaintiff pinned Defendant Maliha to the kitchen counter and cabinets, Defendant Maliha told their daughter to call 911. Deft. Maliha's Statement of Material Facts (Dkt. No. 31, Attach. 3) at ¶ 7. Defendant Maliha took the telephone and started to call 911, but Plaintiff grabbed the telephone's antenna and asked Defendant Maliha not to call the police. Plntf's Statement of Material Facts (Dkt. No. 36) at 10. Defendant Maliha left the house with her daughter and went to her neighbor's house to call 911. Deft. Maliha's Statement of Material Facts (Dkt. No. 31, Attach. 3) at ¶¶ 9-10.

Deputy Sheriff John M. Sperath of the Ulster County Sheriff's Department ("Sheriff's Department") responded to the 911 call. *Id.* at ¶ 11-12. After Deputy Sperath left, Defendant Maliha called

Defendant Faluotico. Deft. Faluotico Statement of Material Facts (Dkt. No. 29, Attach) at ¶ 20. Defendant Faluotico was then employed as a Detective in the Sheriff's Department. *Id.* at ¶ 1. He knew Plaintiff and Defendant Maliha and was aware that Plaintiff was a volunteer member of the Sheriff's Department. Deft. Faluotico Aff. (Dkt. No. 29, Attach. 17) at ¶ 4. Defendant Faluotico was also personally aware that Plaintiff had a large collection of weapons in his home. *Id.* at ¶ 5. At the time of the incident at issue, Plaintiff owned approximately 12 long rifles and 10 to 13 handguns. Deft. Faluotico Statement of Material Facts (Dkt. No. 29, Attach. 18) at ¶ 6.

During their phone conversation, Defendant Maliha told Defendant Faluotico that Plaintiff had grabbed her and pushed her up against the counter, that she had marks on her arms, and that Plaintiff had harassed her. Deft. Faluotico Deposition (Dkt. No. 29, Attach. 11, Ex. H) at 50. Defendant Maliha also said that her daughter was in the house when the incident occurred and that Defendant Maliha was afraid of Plaintiff. *Id.* at 51. After speaking with Defendant Maliha, Defendant Faluotico called the Sheriff's Department's headquarters and Deputy Sperath. Deft. Faluotico Statement of Material Facts (Dkt. No. 29, Attach. 18) at ¶¶ 21-22. Deputy Sperath returned to the scene after his conversation with Defendant Faluotico and prepared a complaint charging Plaintiff with harassment in the second degree. *Id.* at ¶ 23.

Through a request under New York's Freedom of Information Law, Plaintiff obtained tape recorded conversations between members of the Sheriff's Department related to his arrest. Plntf's Mem. of

Law (Dkt. No. 35) at 9, n.9. Based on these recordings, Plaintiff alleges that Deputy Sperath initially reported that he had no basis to arrest Plaintiff, and that it was only after Defendant Faluotico intervened that Deputy Sperath prepared a complaint that "materially exaggerated [P]laintiff's conduct."[1] *Id.* at 9, 19.

At approximately 10:00 pm that evening, Deputy Sperath and Deputy Eric arrested Plaintiff at his home. *Id.* at 25. Plaintiff was arraigned in front of Hurley Town Court Judge Parker and ordered to stay away from Defendant Maliha. *Id.* at ¶¶ 28-29. Judge Parker ultimately dismissed the criminal charge of second degree harassment. *Id.* at ¶ 34. Both Defendant Maliha and Plaintiff subsequently filed family offense petitions in Ulster County Family Court. Deft. Maliha's Statement of Material Facts (Dkt. No. 31, Attach. 3) at ¶¶ 17-18.

Family Court Judge Mary Work presided over a trial regarding the petitions and custody of the Malihas' daughter in September, 2002. *Id.* at ¶ 21. In a Decision and Order dated June 27, 2003, Judge Work found that Plaintiff "started the physical part of the altercation by coming across the room, grabbing Sara Maliha's arm and attempting to forcibly remove the camera from her." Work Dec.

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[1] Defendants assert that the Court should not consider the statements contained in these conversations because they are hearsay and Plaintiff has not established the authenticity or admissibility of the transcripts of these conversations. Deft. Faluotico Reply Mem. (Dkt. No. 37, Attach. 2) at 2; Deft. Maliha Reply Aff. (Dkt. No. 39, Attach. 1) at ¶ 4. Defendants also assert that nothing in the tapes raises a triable issue of fact as to the existence of probable cause. Deft. Faluotico Reply Mem. (Dkt. No. 37, Attach. 2) at 2.

& Order (Dkt. No. 29, Attach. 4, Ex. B) at 6. Moreover, Judge Work found that while Defendant Maliha fled the residence and went to a friend's house to call the police, Plaintiff did not act likewise. *See id.*

In New York, family court and the criminal courts have concurrent jurisdiction over any proceeding concerning acts which would constitute harassment in the second degree between spouses. N.Y. Family Ct. Act § 812 (Consol. 2007). Judge Work found that Plaintiff had harassed Defendant Maliha in the second degree as defined under New York Penal Law § 240.26 (1). *Id.* at 7-8. After hearing testimony from both Plaintiff and Defendant Maliha, Judge Work concluded:

> The Court believes that William Maliha did grab Sara Maliha before he tried to grab the camera. He had to cover more than ten feet to reach her, and she was in the process of leaving with the camera. Her report that he grabbed her first and then reached for the camera makes sense. Whether she struck him once as she admitted or three times as he claimed, she clearly did so after he grabbed her, and her intent was to get away from him, not to harass, annoy or alarm him. William Maliha on the other hand clearly subjected Sara Maliha to physical contact, intended to alarm her into giving up the camera and then to prevent her from calling the police.

Id. at 7. However, Judge Work did dismiss Defendant Maliha's petition against Plaintiff in the interests of justice; she did so because there was little point in holding a hearing on a family offense that appeared to be an isolated event, no other events had been

reported to the court in the nine (9) months following the filing of the petitions, and that took place as the marriage failed. *Id.* at 8.

II. Discussion

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Courts applying this standard must "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) (quoting *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 216) (2d Cir. 2006)).

Once the moving party meets its initial burden by demonstrating that no material fact exists for trial, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citations omitted). The nonmovant "must come forth with evidence sufficient to allow a reasonable jury to find in her favor." *Brown*, 257 F.3d at 251 (citation omitted). Bald assertions or conjecture unsupported by evidence are insufficient to overcome a motion for summary judgment. *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991); *W. World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990).

B. False Arrest Claim

Defendant Faluotico asserts that, assuming his participation in Plaintiff's arrest, summary judgment dismissing the false arrest claim is warranted based on the existence of probable cause to arrest Plaintiff for harassment in the second degree. Deft. Faluotico Mem. Of Law (Dkt. No. 29, Attach. 19) at 7. "The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest, whether that action is brought under state law or under § 1983." *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (internal quotations and citations omitted). Probable cause exists when the arresting officers "have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Id.* This determination should be based on an objective inquiry of the facts known to the arresting officer at the time of the arrest. *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006) (quoting *Devenpeck v. Alford*, 543 U.S. 146, 152-53 (2004)). If there is no dispute as to the pertinent events and the knowledge of the officers, a court can find that probable cause existed as a matter of law. *See Weyant*, 101 F.3d at 852. Accordingly, the Court must determine whether a reasonable juror could believe that there was not probable cause to arrest Plaintiff for harassment in the second degree. *See Jaegly*, 439 F.3d at 152.

Under New York law, a person is guilty of harassment in the second degree, in pertinent part, when, "with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical

contact, or attempts or threatens to do the same." N.Y. PENAL LAW § 240.26 (McKinney 2000). Plaintiff argues that the events surrounding his arrest are in dispute and that the issue of probable cause should be decided by a jury. Plntf's Mem. of Law (Dkt. No. 35) at 21-22. In support, Plaintiff alleges that Defendant Faluotico exaggerated the available information to satisfy the probable cause standard, and failed to investigate the matter properly and contact Plaintiff for his version of the events in question. *Id.* at 22-23. As a result, Plaintiff claims that Defendant Faluotico failed to discover that Plaintiff allegedly only grabbed Defendant Maliha in self-defense and may not have had the requisite intent to "harass, annoy, threaten or alarm." *See id.* Plaintiff further asserts that because Deputy Sperath initially did not charge Plaintiff, Defendant Faluotico had reason to doubt the existence of probable cause based on the statements from Defendant Maliha. *See id.*

Among the undisputed facts related to the incident in question are: Plaintiff held Defendant Maliha by her wrists and pushed her against the kitchen cabinets; Plaintiff prevented Defendant Maliha from calling 911; and Defendant Maliha left the scene with her daughter and went to her neighbor's house to call 911 and Defendant Faluotico. Additionally, Defendant Faluotico has stated that Defendant Maliha, while relaying this information to him during their conversation, told him that she was afraid. Therefore, at the time of the arrest, based on Defendant Maliha's representations, Defendant Faluotico believed that Plaintiff had held and shoved Defendant Maliha and that Defendant Maliha had fled the scene as a result. It was entirely proper for Defendant Faluotico to rely on trustworthy

statements from a witness to determine whether probable cause existed. *See Raymond v. Smith*, 136 F. Supp. 2d 71, 79 (N.D.N.Y. 2001) (Hurd, D.J.) (citing *Martinez v. Simonetti*, 202 F.3d 625, 633 (2d Cir. 2000)). In this instance, there was every reason to credit the allegations as the apparent victim, Defendant Maliha, recounted these facts soon after she fled the scene in fear, going to her neighbors' house. Accordingly, the facts as then-known to Defendant Faluotico, and which are now undisputed, when taken together are sufficient proof of the probability of criminal activity to give a reasonable officer probable cause to believe that Plaintiff shoved Defendant Maliha and acted with the requisite intent. Defendant Faluotico did not need proof beyond a reasonable doubt to arrest Plaintiff, nor is the eventual disposition of the criminal charge relevant to the probable cause determination. *See Bayne v. Provost*, No. 1:04-CV-44, 2005 WL 1871182, at 6 (N.D.N.Y. Aug. 4, 2005) (McAvoy, Senior D.J.). Accordingly, no reasonable juror could find that there was no probable cause to arrest Plaintiff for harassment in the second degree.

Defendant Faluotico also argues that Judge Work's decision finding that Plaintiff committed harassment in the second degree requires the Court to find that probable cause existed and dismiss Plaintiff's claim for false arrest. Deft. Faluotico Mem. of Law (Dkt. No. 29, Attach. 19) at 9. State court judgments have the same preclusive effect in federal courts as they would have in the courts of that state. *Green v. Montgomery*, 219 F.3d 52, 55 (2d Cir. 2000). Collateral estoppel applies under New York law only "'if (1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a

full and fair opportunity to litigate the issue in the first proceeding." *Id.* (quoting *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995)). Moreover, when a § 1983 plaintiff has been convicted of the offense for which he was arrested, that fact has generally been accepted as conclusive evidence of the good faith and reasonableness of the officer's belief in the lawfulness of the arrest. *Cameron v. Fogarty*, 806 F.2d 380, 388 (2d Cir. 1986). While Judge Work's analysis is persuasive, it is not preclusive as to the issue of probable cause. In the earlier proceeding, Judge Work did ultimately dismiss the petition in the interest of justice; therefore, it would stretch the test to conclude that Judge Work's conclusion was actually and necessarily decided and reviewed by the appellate court such that it should bind this Court.

Defendant Faluotico has also argued alternative grounds for dismissal. Defendant Faluotico asserts that he did not arrest Plaintiff and, therefore, Plaintiff cannot allege personal involvement, which is a prerequisite for an award of damages under § 1983. Deft. Faluotico Mem. of Law (Dkt. No. 29, Attach. 19) at 5. In addition, Defendant Faluotico also argues that he is entitled to qualified immunity and that the Complaint may be dismissed on those grounds. *Id.* at 11. Having dismissed the false arrest claim because there was probable cause to arrest Plaintiff, the Court does not need to, and, therefore, does not, address these arguments.

C. Due Process Claim

In the Complaint, Plaintiff's second cause of action states:

> By falsifying official government documents for and with the purpose of injuring plaintiff and denying him a fair trial, defendants violated plaintiff's right to due process as protected by the Fourteenth Amendment to the United States Constitution, as made actionable against them pursuant to 42 U.S.C. sec. 1983.

Compl. (Dkt. No. 1) at ¶ 45. In his Memorandum of Law, Plaintiff argues that Defendant Faluotico "made up statements in an effort to have the plaintiff arrested, exaggerated the available evidence, made pejorative, slanderous and false statements about the plaintiff . . . [that] led to the loss of plaintiff's liberty . . . [and] infring[ed] on his liberty and property interests." Plntf's Mem. of Law (Dkt. No. 35) at 23. Plaintiff concludes that Defendant Faluotico's alleged actions were "offensive to human dignity and an offense to the conscience." *Id.* at 24. Fourth Amendment standards govern the examination of claims arising out of a deprivation of liberty. *Snow v. Vill. of Chatham*, 84 F. Supp. 2d 322, 327 (N.D.N.Y. 2000) (Kahn, D.J.) (citing *Albright v. Oliver*, 510 U.S. 266 (1994)). As described in his Memorandum of Law, Plaintiff's due process claim directly arises from Defendants' actions that allegedly deprived him of liberty. As a result, Plaintiff's due process claim is more properly characterized as a false arrest claim, and not a substantive due process violation, and must be dismissed because the Fourth Amendment provides the constitutional foundation for such claims. *See id.*

D. Claims Against Defendant Maliha

Plaintiff asserts claims against Defendant Maliha pursuant to § 1983. "To state a claim under § 1983, a plaintiff must allege (1) the deprivation of a right secured by the Constitution or laws of the United States (2) which has taken place under color of state law." *Rodriguez v. Weprin*, 116 F.3d 62, 65 (2d Cir. 1997) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982)). The Court has dismissed Plaintiff's due process claim and has found that Defendant Faluotico had probable cause to arrest Plaintiff. Accordingly, there is no constitutional violation under which Plaintiff can sustain an action against Defendant Maliha under § 1983. Therefore, the Court also grants Defendant Maliha's Motion for summary judgment.

Defendant Maliha also seeks an award of reasonable attorney's fees under 42 U.S.C. § 1988. However, counsel for Defendant Maliha has not submitted the records necessary for the Court to determine the propriety of awarding attorney's fees. Therefore, the Court declines to grant fees to Defendant Maliha and dismisses Defendant Maliha's Motion for attorney's fees without prejudice to re-filing.

III. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant Faluotico's Motion for summary judgment (Dkt. No. 29) is **GRANTED** and the claims against Defendant Faluotico are **DISMISSED**; and it is further

ORDERED, that Defendant Maliha's Motion for summary judgment (Dkt. No. 31) is **GRANTED IN PART** and **DENIED IN PART** and the claims against Defendant Maliha are **DISMISSED**; and it is further

ORDERED, that Defendant Maliha's Motion for attorney's fees (Dkt. No. 31) is **DENIED WITHOUT PREJUDICE**; and it is further

ORDERED, that Plaintiff's Complaint (Dkt. No. 1) and the case are **DISMISSED** in their **ENTIRETY**; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties by regular mail.

IT IS SO ORDERED.

DATED: February 28, 2007
Albany, New York

/s/ Lawrence E. Kahn
Lawrence E. Kahn
U.S. District Judge

07-1106-cv
Maliha v. Faluotico

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of June, two thousand eight.

PRESENT: HON. DENNIS JACOBS,
Chief Judge,
HON. CHESTER J. STRAUB,
Circuit Judge,
HON. MIRIAM GOLDMAN CEDARBAUM,
*District Judge.**

UNITED STATES COURT OF APPEALS
FILED
JUN 20 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

WILLIAM MALIHA,

Plaintiff-Appellant,

- v. -

07-1106-cv

FRANK P. FALUOTICO and SARA G. MALIHA,

Defendants-Appellees.

---

* The Honorable Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

APPEARING FOR APPELLANT:

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Sussman & Watkins,
Goshen, NY.

APPEARING FOR APPELLEE
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FOR APPELLEE
SARA G. MALIHA:

STEPHEN L. MOLINSEK,
Friedman and Molinsek, P.C.,
Delmar, NY.

Appeal from a judgment of the United States District Court for the Northern District of New York (Kahn, *J.*)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Plaintiff-Appellant William Maliha ("Maliha") appeals from an order of the United States District Court for the Northern District of New York (Kahn, *J.*) granting summary judgment in favor of Defendants-Appellees, Frank Faluotico ("Faluotico") and Sara Maliha ("Sara Maliha").

The district court granted summary judgment for defendants in this 42 U.S.C. § 1983 action, ruling that probable cause supported Maliha's arrest. We

assume the parties' familiarity with the underlying facts, the procedural history and the issues presented for review.

Maliha contends that the district court erred in granting summary judgment because [1] there is a genuine dispute as to whether there was probable cause to arrest him; and [2] defendants' falsification of official documents deprived Maliha of substantive due process.

We review a grant of summary judgment *de novo*. *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 573, 579 (2d Cir.. 2006). "[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted) .

[1] Maliha argues that the district court failed to draw all permissible factual inferences in his favor because the court ignored his version of events and tape recordings of Faluotico's conversations with other members of the police force. Maliha claims that the recordings reveal that Faluotico deployed false statements and "baseless exaggerations" to precipitate Maliha's arrest.

"There can be no federal civil rights claim for false arrest where the arresting officer had probable cause." *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995). "[P]robable cause to arrest constitutes justification and is a complete defense to an action for false arrest." *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (internal quotation marks omitted).

Under New York law, "[a] person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same. . . ." New York Penal Law § 240.26(1). It is undisputed that in their daughter's presence, Maliha held Sara Maliha's wrists, pinned her arms against her side, pushed her along the kitchen counter so that her head struck a cabinet door, prevented her from calling 911, and caused her to flee to a neighbor's house. It is also undisputed that Sara Maliha told a responding officer that she was afraid to return home that evening. In addition, Faluotico knew that Maliha kept guns in the house.

The police were entitled to rely upon Sara's nearly contemporaneous account of the altercation. *See Singer*, 63 F.3d at 119 ("An arresting officer advised of a crime by a person who claims to be the victim, and who has signed a complaint or information charging someone with the crime, has probable cause to effect an arrest absent circumstances that raise doubt as to the victim's veracity."); *see also Lee v. Sandberg*, 136 F.3d 94, 102-03 (2d Cir. 1997) ("Probable cause exists 'when the arresting officer has knowledge or reliably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested.'" (quoting *Singer*, 63 F.3d at 119)).

Maliha contends that there was "a valid explanation for his actions" — self-defense — and that Faluotico did not personally investigate the incident beyond his phone call with Sara Maliha. *See Jaegly v. Couch*, 439 F.3d 149, 153 (2d. Cir. 2006).

However, neither Faluotico nor John Sperath were "required to explore and eliminate every possible claim of innocence before making an arrest." *Id.* Maliha further contends that Faluotico was motivated by a personal grudge. But probable cause is an objective inquiry. *Lee*, 136 F.3d at 103 n.5 ("The [officer's] motivation to arrest plaintiff is irrelevant to the question of probable cause."). The district court therefore correctly concluded that no reasonable juror could find that probable cause was lacking, and it properly dismissed Maliha's false arrest claim.

[2] Maliha contends that defendants falsified official documents by exaggerating the evidence and making slanderous statements about Maliha to officers in order to deny him a fair trial thereby depriving him of substantive due process.

Where "the Fourth Amendment provides an explicit textual source of constitutional protection against [a type] of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analy[sis]. . . ." *Graham v. Connor*, 490 U.S. 386, 395 (1989). Maliha's substantive due process claim thus merges with his Fourth Amendment claim because the former claim arises from the same set of actions that allegedly violated his Fourth Amendment rights; Maliha himself relies extensively on Faluotico's purported falsifications as evidence that probable cause was lacking. As such, the district court properly dismissed Maliha's substantive due process claim.

The district court properly dismissed Maliha's claims against Sara Maliha because Maliha's arrest was constitutional. *See Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir. 1999) (stating that a § 1983 conspiracy requires, *inter alia*, "an agreement . . . to act in concert to inflict an *unconstitutional* injury") (emphasis added).

We have considered Maliha's remaining claims and find them to be without merit. For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By: /s/ Franklin Perez

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk

by: /s/ One Justice
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

ORIGINAL

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August two thousand and eight,

UNITED STATES COURT OF APPEALS
FILED
AUG 20 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

William Maliha,

Plaintiff-Appellant,

v.

ORDER
07-1106-cv

Frank P. Faluotico and
Sara G. Maliha,

Defendants-Appellees.

Appellant William Maliha having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal

having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Franklin Perez
Frank Perez, Deputy Clerk

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No. 08-562

Supreme Court, U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM MALIHA,

Petitioner,

v.

FRANK FALUOTICO and SARA G. MALIHA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF FACTS

Petitioner's statement of facts contains a number of misrepresentations and material omissions. Although petitioner claims that he was punched and grabbed by his wife on June 19, 2002, he omits the fact that, prior to his wife's alleged actions, petitioner lunged at his wife from across the room and grabbed a camera from her. Although petitioner acknowledges that he held his wife by her wrists and backed her across the kitchen, he omits the fact that he caused his wife's head to come into contact with the kitchen cabinets. Petitioner also omits the fact that, prior to fleeing the residence in fear, his wife told the parties' young daughter to call 911 and, after Mrs. Maliha had been released by petitioner and was able to retrieve the phone herself, petitioner grabbed the phone from her in order to prevent her from calling for help.

Upon leaving the residence, co-respondent Maliha went directly to a neighbor's house, where she called a domestic abuse hotline and, at the urging of the neighbor, called 911 and respondent Faluotico, a detective with the Ulster County Sheriff's Department and former neighbor and social acquaintance of the Malihas. Ulster County Sheriff's Deputy John Sperath responded to the 911 call from co-respondent Maliha. Mrs. Maliha told Sperath that petitioner "grabbed her by her wrists and pushed her into the kitchen cabinets". Mrs. Maliha also told Sperath that she fled the residence to her neighbor's house, and was afraid to go back. Mrs. Maliha also told Sperath

that petitioner had been "on edge" lately, that they had been having marital problems and that there were guns in the residence.

Petitioner's statement of facts is also inaccurate due to the fact that petitioner relies heavily and erroneously on transcripts of phone conversations that do not constitute proof in admissible form and, in any event, do not raise any question as to the existence of probable cause. If anything, the transcripts support the existence of probable cause in that they reflect Mrs. Maliha's fear of petitioner and the complaints made by her to the Sheriff's Department. Indeed, Deputy Sperath indicates in a phone call attributed to him that he was afraid to go to the Maliha home by himself based on the fear exhibited by Mrs. Maliha.

In any event, the purported transcripts should not be considered to the extent they contain inadmissible hearsay. Rather than deposing the witnesses regarding their alleged involvement, petitioner attempted to raise an issue of fact based on the non-party witnesses' hearsay statements and his own slanted and unsupported interpretation of said statements. Petitioner's version of what was said is not supported by the transcripts offered in opposition to the motion for summary judgment. For example, petitioner claims that Deputy Eric Benjamin can be heard on the tape disagreeing with having petitioner arrested. The transcripts submitted by petitioner reveal that Benjamin did not think Mrs. Maliha would fabricate what happened and that there were grounds for a mandatory arrest. Petitioner's

statement of facts is also misplaced in its reliance on the lack of any alleged "assault" or injury as indicating the lack of any basis for an arrest. Harassment in the second degree pursuant to New York Penal Law § 240.26(1) is committed when a person, with the intent to harass, annoy, threaten or alarm another person, strikes, shoves, kicks or otherwise subjects another person to physical contact. There is no requirement for an injury in order to have probable cause for an arrest for Harassment in the second degree in New York. Based on the undisputed facts of this case, including that petitioner lunged at his wife, grabbed a camera from her, pushed her across the kitchen while holding her arms, causing her head to come into contact with the cabinets and resulting in her fleeing the residence in fear, there can be no doubt that petitioner committed acts which provide probable cause for an arrest for Harassment in the second degree.

Finally, while petitioner relies on the dismissal of the criminal charge against him, he omits the fact that Family Court had concurrent jurisdiction over the Harassment charge (*see*, New York Family Court Act § 812(1) ["The family court and criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute . . . harassment in the second degree . . . "]) and that Family Court only dismissed the charge in the interest of justice, after it determined, based on the parties' testimony, that petitioner committed acts which constituted Harassment in the second degree. In any event, it is well settled that a determination of probable

cause is not dependent on the ultimate outcome of the charges, but instead is based on the reasonable conclusion to be drawn from the facts known by the officer at the time of the incident. In this case, probable cause to arrest exists as reflected in the initial report by Mrs. Maliha to Deputy Sperath (prior to any involvement by Faluotico) that petitioner "grabbed her by her wrists and pushed her into the kitchen cabinets", that she fled the residence to her neighbor's house, was afraid to go back, that petitioner had been "on edge" lately, that they had been having marital problems and that there were guns in the residence. As the determination that probable cause existed as a matter of law is supported by the facts and relevant authority, it is submitted that the petition seeking certiorari should be denied.

REASONS FOR REFUSING THE PETITION

A. SUBJECTIVE INTENT IS IRRELEVANT IN A DETERMINATION OF THE EXISTENCE OF PROBABLE CAUSE FOR AN ARREST

In support of the petition for certiorari, petitioner acknowledges that this Court has repeatedly held that subjective intent is irrelevant where there is an objectively reasonable basis for an arrest, but argue that this Court has not ruled on whether an alleged hostile and personal motive by the arresting officer that is allegedly unrelated to proper law enforcement objectives, can defeat the constitutionality of an allegedly dubious arrest (*see*, Petition, at 15). Petitioner's

argument should be rejected because it is based on the faulty premise that there was no basis for an arrest until after Faluotico became involved. The description of the incident by Mrs. Maliha to Deputy Sperath upon Sperath's arrival at the Liffman home in response to the 911 call fully supports the arrest for Harassment in the second degree. Mrs. Maliha told Deputy Sperath that petitioner "grabbed her by her wrists and pushed her into the kitchen cabinets". Mrs. Maliha also told Sperath that she fled the residence to her neighbor's house, and was afraid to go back. Mrs. Maliha also told Sperath that petitioner had been "on edge" lately, that they had been having marital problems and that there were guns in the residence. Based on the initial report, no reasonable juror could conclude that probable cause for the arrest was lacking.

The inquiry into probable cause is objective and the subjective beliefs or *motivations* of the arresting officer are irrelevant (*see*, *Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 593-594, 160 L.Ed.2d 537 (2004); *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)). This Court reaffirmed in *Devenpeck* that "an arresting officer's state of mind (except for the facts he knows) is irrelevant to the existence of probable cause" (*Devenpeck*, 543 U.S., at 153, 125 S.Ct., at 593). *Devenpeck* squarely rejects petitioner's reliance on the alleged subjective motivations of Faluotico in determining the existence of probable cause, holding that "subjective intent of the arresting officer . . . is simply no basis for invalidating

an arrest" (*id.*, at 543 U.S., at 154, 125 S.Ct., at 594). Petitioner offers no authority for the claim that claimed motivations of Faluotico may be relevant. Furthermore, the claim that the alleged misrepresentations of Faluotico fabricated probable cause where none existed otherwise is not supported by the factual record.

It should also be noted that, even if it is assumed for the purpose of argument that petitioner was able to raise an issue of fact as to probable cause, dismissal would nonetheless have been warranted on the basis of qualified immunity. Faluotico requested qualified immunity in his original motion for summary judgment and preserved the issue for review by offering it as an alternative basis for affirmation on appeal. As the District Court and the Second Circuit determined that there was probable cause as a matter of law, there was never any need to determine the existence of arguable probable cause so as to support qualified immunity. In the context of petitioner's current arguments for certiorari, it should be noted that this Court has held that "an allegation of malice is not sufficient to defeat immunity if the respondent acted in an objectively reasonable manner" (*Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986), *citing Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

B. SUMMARY JUDGMENT WAS PROPERLY GRANTED

Petitioner argues that the Courts below improperly intruded on the role of the fact-finder in awarding summary judgment (*see* Petition, at 17). Contrary to petitioner's argument, the decisions granting summary judgment and dismissing the complaint were properly based on the undisputed facts in the case. These undisputed facts include that petitioner grabbed a camera from his wife, held her by her wrists while he pushed her backwards, causing her head to come into contact with the kitchen cabinets, and thereafter prevented her from calling 911, resulting in her fleeing the residence in fear and calling a domestic abuse hotline and 911. These undisputed facts are sufficient to support the finding of probable cause. The alleged reasonable inferences relied on by petitioner are irrelevant to an objective determination of probable cause. As such, there is no basis for petitioner's request that this Court grant a writ of certiorari.

CONCLUSION

Respondent Frank Faluotico respectfully requests that this Court deny petitioner's request for a writ of certiorari.

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Respectfully submitted,

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